CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JANUARY TERM, 1827.

TAYLOR vs. *HOLLANDER.*

APPEAL from the court of probates of the parish and city of New Orleans.

In an action against one executor of an estate, a co-executor may be called as a witness by the plaintiff.

So if he has been discharged from his office he is a good witness.

If an executor who has become insolvent, is sued in the court of probates for notes and obligations belonging to the estate, and it appears

PORTER, J. delivered the opinion of the court. This case has been already before the court, and was remanded for further proceedings. *Vol.* 4, 535.

On its return to the court of probates, an examination of the merits was gone into, and it appearing to the judge below that the notes and other specific property claimed in the petition, had been alienated and transfer-

Eastern Dis'e. *January.* 827

TAYLOR *vs* HOLLANDER.

red before the commencement of the suit, he gave judgment of non-suit against the plaintiff, and from that judgment this appeal has been taken.

he has transferred them, the cause must be cumulated with the proceedings in the *concurso.*

Before the correctness of this opinion can be enquired into, it becomes necessary to examine the propriety of a decision of the judge *a quo,* on the trial, which is presented to our consideration by a bill of exceptions.

By this decision the judge overruled an objection taken by the defendant, that Shepherd, one of the executors of the last will and testament of Harman, was not a competent witness; and secondly, that no parol evidence could be given to show in what capacity the defendant received the notes, which form the subject of the present contest, as the receipt is signed by him in his individual character, without any addition thereto.

Whether Shepherd, at the time he was called on to testify, was, as the plaintiff contends, discharged from the office of executor, or whether he still continued to fulfil its duties, it appears to us the court below did not err. For, in the first hypothesis he had no interest in the event of the suit; and in the

second, he had one opposed to the party calling him, as executors by our law are liable in *solido*, unless the testator himself has divided their functions, and each of them has confined himself to the duties allotted to him. *C. code*, 243—*art.* 177.

It is also our opinion, that the judge below did not err in permitting parol evidence to be received to show in what character the defendant had got these notes into his possession. The receipt purports, that they were received by the defendant on account of the estate of Thomas L. Harman, deceased. The documents prove that at the time they were delivered the defendant was executor of this estate. As the law raises a presumption that he took them in the only capacity in which he was authorised to receive them, and this presumption was, in some measure, opposed by his not adding the term executor to the receipt, there was such an ambiguity as could be properly removed by parol testimony; the only effect of which was to explain, and not to contradict.

On the merits, however, we think the judge decided correctly in favor of the de-

Eastern Dis'ct
January, 1827

TAYLOR
vs.
HOLLANDER

fendant. The evidence showed that the note delivered to the executor had already been passed by him, and was no longer in his power, that it had become the property of a third party. The only judgment, then, which thecourt could have correctly given, was for its amount, and this, after the defendant had failed, could not be done in the court of probates; for as that judgment would have to be satisfied out of the moneys in the hands of the syndics, the amount due must be settled contradictorily with the other creditors.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be affirmed with costs.

Hennen & *Grymes* for the plaintiff, *Peirce* & *Eustis* for the defendant.

RICHARDS vs. *HIS CREDITORS.*

The loss of credit is a good cause for a debtor to obtain relief by a cession of his goods.

APPEAL from the court of the first district.

MATTHEWS, J. delivered the opinion of the court. In this case opposition was made to the homologation of the proceedings, which

ook place before the notary, in pursuance of an order of the court below; founded on two grounds:

1. That the insolvent has not set forth any losses.

2. That he has not presented any books of accounts.

This opposition being overruled by the district court, the opposing creditor moved for a new trial, and having failed in that motion, took the present appeal.

We are of opinion that the judgment of the court below was correct in setting aside the opposition of the appellant, as not being supportable on the grounds by him assumed. It is true that the unfortunate debtor in his petition, alleges no loss except that of his credit, or confidence reposed in him by his mercantile friends: His whole capital seems to have been exclusively his credit or the faith which others had in his fidelity; which, although very unsubstantial, has often been productive of great gains, and is certainly considered by merchants as a very important means of operation.

The section of the act of 1817, which requires an insolvent to present his books of ac-

Eastern Dis'ct *January*, 1827

RICHARDS *vs.* HIS CREDITORS.

counts, is applicable only to such persons as keep books of that kind, and who, from a multiplicity of business, must, of necessity, keep them. The commercial transactions of the plaintiff in the present case, appear to have been so limited, that they may have been placed in a fair and just light without the aid of books, or any great exertion of memory.

The affidavit of the opposing creditor in support of his motion for a new trial, as based on the discovery of new evidence, charges on the insolvent a crime of a very serious nature. It contains an accusation, which, considered solely in relation to the offence alleged, ought not lightly to be made, or lightly to be passed over when made; being nothing less than an accusation of *forgery*. But considered in relation to the opponent's application for a new trial, we are of opinion that it is entitled to little weight. The facts disclosed in the affidavit, are such as might have been discovered and the evidence to sustain them, by ordinary diligence on the part of the appellant, if he had obeyed the summons which called the creditors together, and examined the schedule of the insolvent.

Eastern Dis'ct *January*, 1827

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Maybin for the plaintiff, *Strawbridge* for the defendant.

MATHURIN vs. *LIVAUDAIS.*

A bequest to a master of a slave, of a sum of money in payment of the slave, is not a *fidei commissum.*

APPEAL from the court of probates of the parish and city of New Orleans.

PORTER, J. delivered the opinion of the court. The question presented for decision in this case arises under the will of a free man of colour, who, leaving one of his children a slave, made the following disposition of a part of his property:—

"*Comme mon fils Narcisse est encore esclave, et que je desire contribuer a lui assurer sa liberte, je donne et legue a son maitre, Mr. Charles Enoul Dugue Livaudais, une somme de six cents piastres, a la charge par lui de considerer ladite somme un acompte a valoir sur le prix qu'il pourra exiger de mon fils Narcisse, pour lui donner sa liberte en bonne forme.*"

"As my son Narcisse is yet a slave, and as I wish to contribute to his emancipation, I

Eastern Dis'ct
January, 18[illegible]7

MATHURIN
vs.
LIVAUDAIS.

give as a legacy, to his master Mr. Charles Enoul Dugue Livaudais, a sum of six hundred dollars, on the condition that the said sum is to be considered by him as so much on account of the price which he may demand from my son Narcisse, to give him his liberty in proper form."

This disposition is attacked by a son of the testator's and brother of the slave, who was to derive a benefit from the legacy, on the ground that it is a *fidei commissum*, and prohibited by law.

This is one of the harshest demands, and the most revolting to every principle of equity and justice that has, as yet, fallen under our consideration.

Nor do we think it supported by law. Our code, it is true, declares that substitutions and *fidei commissa* are abolished. But the object of this change in our jurisprudence was, as it is well known, to prevent property from being tied up for a length of time in the hands of individuals, and placed out of the reach of commerce. The framers of our code, certainly never contemplated to abolish naked trusts, uncoupled with an interest, which were to be executed immediately. If they had,

they would not have specially provided in a subsequent part of the work for testamentary executors, described their duties, and recognised the validity of their acts. The obligation imposed on the legatee by the will of the testator in this case, cannot be distinguished from that of an executor, except in the name; and it is the duty of the court to look to things, rather than to the words.

But the question does not require to be decided on this ground. By another provision of the code, it is declared that slaves cannot dispose of or receive by donation *inter vivos* or *mortis causa*, unless they have been previously and expressly enfranchised agreeably to law. *C. Code*, 208. *art.* 5.

Being thus made incapable of receiving, this legacy cannot be considered as a *fidei commissum*. It is not a charge to one to receive for, and render to, another; because that other has not in the eye of the law a legal existence: until the slave is emancipated, he cannot demand the thing bequeathed.

It may be objected to this reasoning, that as the slave has a legal capacity to maintain an action for his freedom, he, of course, could have ana ction to enforce the application of the

Eastern Dis'ct January, 1827

MATHURIN vs. LIVAUDAIS.

money left to another to purchase his freedom. But this right to sue for freedom is an exception from the general rule, and far from supposing any legal capacity to own or receive property in the slave, the object of the suit is to acquire it.

By the Roman law, a bequest of the kind now before us, was considered as a *fidei commissum*. We must guard, however, against adopting and applying rules of that jurisprudence which were introduced for the purpose of giving effect to last wills and testaments to cases, where under new statutory provisions these rules would defeat the will of the testator. This distinction has been taken in France, in the construction of that article of the Napoleon code which abolishes substitutions; and the correctness and wisdom of it is placed beyond doubt by the decisions of their courts, and the able development given of the reasons for introducing such a distinction by their juris-consults, particularly Merlin & Toullier. The last mentioned author states that it is the spirit of their law, and of their jurisprudence, not to annul a testamentary disposition made under the code, except it *necessarily* presents a substitution,

Eastern Dis'ct January, 1827.

MATHURIN vs LIVAUDAIS.

and cannot be supported and interpreted in any other manner. Nouveau Repertoire, verbo substitution, fidei commissaire. Sect. 8. No. 7. Toullier, vol. 5. lib. 3. tit. 2. cap. 1. No. 10—50.

For the balance in the hands of the executor, the plaintiff has no claim. The amount is shewn to be less than the sum which Rosette, one of the children deceased, is entitled to by the will.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be affirmed with costs.

Derbigny for the defendant.

O'BRIEN vs. *LOUISIANA STATE BANK.*

APPEAL from the court of the first district.

The teller of a bank, who has overpaid a check, is a good witness without a release.

MARTIN, J. delivered the opinion of the court.

The plaintiff and appellant complains that, having deposited in the defendant's banking house a sum of $1400, and procured from their teller a corresponding entry in his bank books, they now refuse to restore it, and their officer fraudulently struck out the entry and

Eastern Dis'et
January 1827

O'BRIEN
vs.
LOUISIANA
STATE BANK.

substituted one for a very trifling sum, viz: $55.

They pleaded the general issue, and averred the plaintiff had deposited the latter sum only, and the first entry was made through error and was afterwards corrected. They had a verdict and judgment, and the plaintiff appealed.

There is a bill of exceptions to the opinion of the inferior judge, admitting the testimony of the teller. It is urged that the release the defendants gave him was not under the seal of the bank, and that they released him from the consequences of his *error*, but not of his *fraud*.

We are of opinion no relief was necessary. This point was inquired into and disposed of in this court last year, in Jordan *vs.* White, vol. 4, 340. And we held that "agents and servants may be received as witnesses, for their principals and masters without a release of responsibility for apparent misconduct and negligence, and where the affairs conducted by them have been in the ordinary course of business. Starkie, in his admirable treatise on the law of evidence, has collected all the English authorities on this head, and in Metcalf's edition of that work, the American have been added. 2 Starkie on evidence, 753.

The testimony fully establishes the averred mistake, and that another customer having at the same time deposited the large sum, the smaller was entered in his book, and the larger in the plaintiff's.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Hoffman for the plaintiffs, *Grymes* for the defendants.

CALDWELL vs. *TOWNSEND.*

Whether an attorney for an absent debtor can confess judgment. *quere.*
The money in the garnishee's hands, cannot be taken from him before final judgment against the defendant in attachment.

APPEAL from the court of the parish and city of New Orleans.

PORTER, J. delivered the opinion of the court. The appeal is taken in this case from a decision of the judge *a quo* on a rule taken by the plaintiff on the garnishee, to shew cause why judgment should not be rendered against the defendant. The court was of opinion that the garnishee was discharged by the answer which he had made to the interrogatories propounded to him. The correctness of this opinion, and the propriety of the judge refusing the plaintiff permission to ob-

Eastern Dis'et
January, 1826

CALDWELL
vs.
TOWNSEND.

tain testimony from New York, to prove that there were funds in the hands of garnishee, have been both discussed by the counsel, but we do not find it necessary to go into them; for we are of opinion that the cause is not before us in such a way as to authorise us to do so.

The garnishee is only responsible to the plaintiff in attachment, through the claim which he has enforced to judgment against the defendant in the cause, and no such judgment appears on record in this case.

There is an agreement which we presume was intended to have the effect of one, in the following words :—

"It is agreed in this case, that defendant's counsel shall permit the plaintiff to take a judgment according to the prayer of petitioner, upon the condition that plaintiff will consent to open the judgment again, provided the defendant so wishes, and shall desire to have a regular trial of the case. And it is further agreed that any sum of money, in which the garnishee shall be adjudged to be indebted to the defendant, shall remain deposited in court, subject to any judgment to be rendered in the premises, either by consent or otherwise; and

that said sum of money shall be subject to all the conditions above specified."

Admitting that an attorney of an absent debtor has power, under the appointment held from the court, to confess a judgment (which we strongly doubt) there is nothing in the agreement just set out, which can authorise the plaintiff to take out of the hands of the debtors of the defendant, the monies due to him. It is not the judgment of the court, but an agreement that the plaintiffs should take one, and *non constat* that the court would have sanctioned by its decree, such an agreement as the attornies of the parties had entered into. Even if it had, the judgment would not have been final; for it expressly stipulates that the defendant shall hereafter have a regular trial on the merits, if he requires it.

On every point of view in which we can consider the cause, the appeal must be dismissed with cost.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed.

Maybin for the plaintiff, *Conrad* for defendant, *Grymes* for garnishee.

Eastern Dis'ct. *January*, 1827

U. S. BANK vs. *JOHNSON*.

The cashier of a bank who overpaid a check, is a good witness without a release.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The only question which this case presents, arises out of a bill of exceptions taken on the trial in the court of the first instance.

The plaintiffs offered one of their clerks as a witness to prove that a check which was drawn for $876 29 cents, had been overpaid $1000, in consequence of the amount in figures being $1876 29 cents, instead of $876 29 cents, the sum in which it was filled up in the body of the check.

The competency of this witness has been contested in the argument, and though the question has been considered as settled by several decisions in this court, which cannot in principle be distinguished from that now before us, we have been induced to review them, in consequence of an authority produced by the defendant's counsel from a late work on evidence by Starkie, which enjoys, as it merits, a high reputation with the profession.

In the case of *Butler* vs. *De Hart*, this court was of opinion, that in an action for the

non delivery of cotton, the consignee was a good witness. *Vol.* 1, 185.

In that of *Robertson* vs. *Nott*, we decided that an agent through whom a negociation had been carried on between the plaintiff and defendant. was competent to testify for the former. *Vol.* 2, 122.

The same question arose in the case of *Pratt* vs. *Flower and als.* A witness who had been intrusted with a note, and had received instructions to hand it over, was admitted to prove that he had complied with these instructions. *Ibid* 334.

So in the case of *Jordan* vs. *White*, it was held, that the mate of a vessel was a good witness in an action against the owners by the master, to prove or disprove negligence imputed to the latter. *Vol.* 4, 335.

The decisions were all made on a principle understood to be clearly settled in that jurisprudence from which we have taken our rules of evidence, that agents and servants were competent witnesses, altho' the regularity and correctness of their conduct were involved in the transaction on which they were called to give their testimony.

Phillips, in his treatise on evidence,

states, "it may be laid down as a general rule, that executors in trust, trustees and agents, are not incompetent merely on the ground of their liability to action." *Phillips on Ev. ed.* 1820, 42.

Again. "On the same principle of convenience, it is the common practice to admit servants and agents without a release, *to prove the payment* or receipt of money, or the delivery of goods on behalf of their masters or principal, though their evidence tends to discharge themselves." *Ibid*, 100.

For this doctrine a great variety of authorities are cited, drawn from as high a source, as any known to the laws of the country on which he writes.

To the same effect is Starkie, whose work is relied on to show the incompetency of the witness.

He states "upon the ground that (of necessity and public convenience) it is the constant course to admit the servant of a tradesman to prove the delivery of goods, and the payment of money, without any release from the master."

"So it has been held that an apprentice is a competent witness to prove that money

has been overpaid by his master." So in an action against a carrier for not delivering a parcel, his servant was held to be competent to prove the delivery. And in an action by the party robbed against the hundred, he is a competent witness as to the fact of the robbery, although he is not only interested, but the plaintiff in the suit." *Starkie on evidence, part* 4, 754.

In a subsequent part of his work, he lays down the same rule in treating of agents, and cites as an example the case which is now before the court, namely, that of a servant paying money for his master. *Ibid* 768.

These doctrines have been received and acted on to their fullest extent, in those states of the union, where it is understood the science of jurisprudence has been cultivated with the most success; namely, in Massachusetts, Pennsylvania, & New-York. 11 *Massachusetts*, 242; 2 *Johnson*. 189; 5 *ibid*, 256; 1 *Dallas*, 241; 3 *Sergeant and Rawle*, 20.

Had this court been called to establish the rule instead of applying it, we should have hesitated much in adopting that which we have found in the books. The reasons

of necessity and public convenience, which are stated as the grounds for it, do not seem to us to have that weight, which others attach to them. For we cannot see what difficulty there would have been in all cases for the master or principal to have given a release, and thus have placed the witness without any interest in the cause. But we did not feel that, on that consideration alone, we would have been justified in setting aside a rule so long settled, and so generally adopted.

We now proceed to notice that part of the work of Starkie on which the appellant relies. In the text, after stating the rule that agents are admissable on the score of necessity, he adds, "but although an agent who actually executed the business of his principal is, it seems, in all cases, competent to prove that he acted according to the directions of his principal, on the ground of necessity, and because the principal can never maintain an action against his agent, for acting according to his own directions whatever may be the result of the cause. Yet, if the case depends on the question, whether the agent has been guilty of some tortuous

act, or negligence, in the course of executing the orders of his principal, and in respect to which he would be liable even to the principal if he failed, the agent is not competent without a release." 3 *Starkie*, 1731.

If the grounds on which this author states the *exception* rests be correct, the *rule* itself is destroyed—they cannot stand together.

The rule is, that agents and servants, tho' interested, are admitted as witnesses *ex necessitate*, and from motives of public convenience.

The exception is, that they are not so when interested, in consequence of their being liable over to the party who calls them, in case he fails in the action.

If the reason given by the author for the rule, was correct, the distinction which he takes might be admitted.

That reason is stated to be, that where the agent or servant, acts according to the directions of his principal, the former can never be responsible to the latter in an action.

But this reason is most clearly not that on which the rule rests. In the case of an a-

Eastern Dis'ct January 1827

U. S. BANK vs. JOHNSON.

gent called on to prove that he acted according to the instructions he received, the argument assumes every thing that is disputed; the compliance with instructions being the very fact which the witness is called on to establish, and the non-establishing of which would most clearly render him liable over to those who employed him.

The cases most frequently given in support of the general rule, are, money intrusted to an agent or servant to be paid to another, or goods delivered to a carrier to be handed over to a third person. Now we cannot distinguish these cases on the score of liability of the witness, from that before the court. In them, the fact at issue being the delivery of the goods or the money, it is clear, that if the agents or carriers failed to establish that the thing confided to them had been delivered, they would be responsible to the principal, and that in proving they did they destroyed the responsibility. So here the witness, in proving that the money was paid to the defendant, may throw the liability off himself. The cases cannot be distinguished, except that in the latter his inter-

est is not so great, as will be hereafter shewn.

If the witness in the instance before us, had been sent by the bank with a sum of money to make a payment, and the fact of his having done so was afterwards contested, he would present the very case which is invariably given as an illustration of the rule, and he would be competent to prove that he had delivered it; and yet in that case, he would be as responsible to the bank in case he failed to show that he had discharged faithfully the trust committed to him, as he would in the action before us, if he failed to prove that he had committed an error, and paid through mistake, a part of the funds with which he was intrusted, to the defendant.

Nay, he would be more so; for, in proving that he committed an error, he would establish his liability to the bank, in case of the insolvency of the defendant.

The distinction, then, which this author makes on the ground of liability, is on principle, entirely without foundation—it is equally unsupported by authority. It has

Eastern Dis't et January, 1827

U. S. Bank vs. Johnson.

been expressly decided, that where a carrier who was directed to deliver money to A, delivered it by mistake to B, that in an action by the owner against B, the carrier is a competent witness without a release. 3 *Campbell*, 144—*Buller's n. p.* 289.

The authorities quoted in support of the doctrine which we have just examined, do not support the writer. They are all cases which arose on the negligence or tortuous acts of servants in driving carriages, and they turn on a principle already recognised by this court, that where the act of the servant has been out of the ordinary course of his employment or a mere breach of duty, he is not a competent witness without a release. *Phillips on Ev.* 100. 4 *Term. Rep.* 590, *Vol.* 4, *N. S.* 340.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Livermore for the plaintiff, *Carleton & Lockett* for the defendant.

SMITH vs. *HARRATHY.*

Eastern Dis'ct
January, 1827

A new trial may be prayed for, after 3 days, if the judgment be not signed.

If a party *is bound to furnish an account*, his adversary may use that part of it which is against him, without being compelled to admit the items in it that are in his favor.

APPEAL from the court of the city and parish of New Orleans.

MATTHEWS, J. delivered the opinion of the court. In this suit the plaintiff claims from the defendant $381 43, on account of corn and oats, which he alleges was received by the latter from him as a part of a common stock of such articles, which was to have been furnished mutually by the parties to the present action; and to have been sold by the defendant for their joint benefit and interest. It is alleged in the petition, that he entirely failed to furnish any thing to the stock, which was to have been common; and the pleadings of the cause end in causing accounts to be submitted by both parties. On which, and the evidence in their support, the court below rendered judgment in favor of the plaintiff, for $51 26; from which the defendant appealed.

Previous to taking the appeal, an application was made by the applicant to the parish court for a new trial, which was refused on the ground of not having been made prior to the expiration of the time allowed by law.

The record shews that a new trial was not

Eastern Dis'ct
January, 1827

SMITH
vs.
HARRATHY.

asked, until three days after judgment had been entered upon the minutes of the court; but it was moved for before the judgment was signed by the judge. According to the provisions of the Code of Practice, three judicial days appear to have been intended as the time allowed after final judgment rendered, to move for a new trial. *See Acts* 546 and 558.

If no application be made for a new trial within that period, and the judgment be signed in pursuance of the Art. 546, it could not afterwards be legally made. But the question which arises on the state of the present case, is whether this limitation of time be a bar to any motion made for a new trial when the judgment is not actually signed. A case occurred analogous, if not similar, to that now under consideration, soon after the organization of this court, in which it became necessary to give an interpretation to the section of act of 1813, which related to the manner of making a statement of facts. The opinion therein expressed by the court, recognised the right to make such statement at any time before the actual signing of the judgment. See *T. R. p.* 201. A judgment, though entered on the minutes of the court, cannot be consi-

dered as fully complete and efficacious until it receives the signature of the judge, because this is required by law; and until it be thus completed, we are unable to see any good reason why it should not be open to a revision. Certainly none better or stronger can be stated, than might fairly be urged against a statement of facts made after the time of rendering judgment, but before its signature.

This view of the cause shews evidently that we differ in opinion with the judge *a quo*, as to the reasoning which influenced him in rejecting the application of the defendant for a new trial. But as the record contains all the grounds on which such application seems to have been based, we must proceed to examine their soundness and sufficiency to support the pretensions of the applicant.

The principal, if not the only, objection made to the correctness of the judgment of the parish court, is the rejection of $250, claimed by the appellant, as having been by him brought into the partnership, and by which the common stock or capital was increased to that amount in addition to the $616, furnished by the appellee. In support of this item of $250, as charged in the account rendered by the defend-

Eastern Dis't
January, 1827

SMITH
vs.
HANRATHY.

ant, no evidence was offered on the trial of the case in the court below. But it is now contended, that as that court made this account the basis of its judgment, it ought to have been admitted *in toto*. To this proposition on the part of the appellant, we cannot assent. It is certainly a sound general rule in relation to evidence, to be admitted on record in courts of justice, that a party to a suit cannot create testimony exclusively favorable to himself. It is difficult to imagine any circumstances in cases of open accounts, where one of the parties is legally bound to account to the other for the management and conduct of affairs in which the latter is solely interested, or in which both may be jointly, of sufficient force to form an exception to the general rule above stated. We are, however, decidedly of opinion that the present cause is not so circumstanced, as to tolerate the slightest deviation from the rule. The item of $250, standing wholly without support, either from evidence or judicial confession, was properly excluded from the account rendered by the defendant in giving judgment; and the court below decided correctly in basing its decision on the capital furnished by the plaintiff alone,

and the trading operations which took place on it, being the only matters admitted by both parties to the suit. As the appellant was legally bound to prove the item of $250, claimed by him as a credit, on the trial of the cause in the parish court, a new trial ought not to be granted, unless upon the ground of a discovery of evidence subsequent to the trial, &c. That he had made such discovery, the record furnishes no evidence. From the principles assumed in this decision, it is readily perceived that the present case differs essentially from that of Wakeman, ass. of Foot, *vs.* Marquand & Paulding, recently adjudged. In that, the party who introduced the account, which the other wished to take advantage of to his prejudice, was not bound to render any account, and if admitted at all as evidence, was properly received in its totality.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Lockett for the plaintiff, *Preston* for the defendant.

Eastern Dis'ct
January, 1827

POIGNAND vs. *LIVERMORE.*

Proof of the dissolution of a partnership need not be in writing.

An authority to a partner to settle the affairs of the partnership, does not authorise him to endorse notes belonging to it.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This is an action against the owner of a steam boat, for money advanced to the clerk to pay the wages of the crew, and to purchase necessaries for her. The general issue was pleaded: the court below gave judgment for the plaintiff, and the defendant appealed.

The petition set out two demands; one of them has been abandoned: the other is evidenced by a note in the following words:—

Louisville, Aug. 25, 1821.

$300. Three days after date, I promise to pay to the order of Wm. F. Peterson & Co. three hundred dollars, for value received, on account of steam boat James Ross and owners. Signed,

GEO. F. BARTLETT.

The note is indorsed, "Pay to D. R. Poignand, or order. Israel Munroe, agent and assignee of the late firm of Wm. F. Peterson & Co."

The first objection made to the plaintiff's right of recovery is, that there is not proof the

note was indorsed to him by the payees.

One witness swears that by the public papers he has seen a dissolution of the firm of Wm. F. Peterson & Co. but does not recollect the date.

Another declares that the partnership was dissolved at Louisville, on the 2d October, 1823, and all the concerns of the firm were placed in the hands of Israel Munroe, to close the concerns of the firm.

A third states that the firm is dissolved, and that Munroe is the acting partner.

It is objected that the proof of the isdsolution and agency should be made by written, not by parol evidence.

This argument assumes that all partnerships are entered into in consequence of agreements reduced to writing, which we believe is not the fact, nor is it necessary to their validity. If entered into verbally, they may be dissolved in the same manner. No evidence has been adduced that the contract of this partnership was reduced to writing, or that it was dissolved in that way. The parol evidence was therefore properly admitted.

The same observations apply to the authority of the agent not being proved in writing.

Eastern Dis't
January, 1827

POIGNAND
vs.
LIVERMORE.

But whether the authority which, the evidence shews, was given to the acting partner, enabled him to indorse bills or notes belonging to the firm, is a question equally important in settling the legal rights of the parties The pleadings and evidence shew that the note was indorsed after the dissolution of the firm by the acting partner, who was authorised to close its concerns, and that this indo sement was made in the state of Kentucky. The testimony also shews, that the assignment was made to cover a claim against the firm.

Whether we take the system of law which prevails in the country where this contract was entered into, or follow on our own as a guide, no authority has been shewn in the acting partner to indorse the note sued on; and consequently the plaintiff has not proved that the right of the payees is vested in him. By our law, a general power to settle the affairs of a partnership, would not authorise the partner to indorse notes which belonged to it. The mandate to indorse must, in the language of our code, be *express* and *special*. It is equally clear that at common law, an authority given to one partner to settle the affairs of a firm which is dissolved, does not empower him to indorse

bills or promissory notes, even though, as in the present case, they existed prior to the dissolution, and were transferred for the purpose of liquidating the partnership debts. *C. Code*, 29, 66. *Watson on Part.* 212. 1 *Henry Black*, 155, 3 *Esp.* 108. 4 *Johnson*, 224.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed. And that there be judgment for the defendant as in case of non-suit, with costs in both courts.

Whittelsey for the plaintiff—Defendant, in person.

THE STATE vs. *THE BANK OF LOUISIANA.*

When the record enables the court to act on the merits, their attention may be drawn, without a formal assignment, to any error in the proceedings, after ten days have expired from the filing of the record.

A bank may be sued by one of the stockholders, for his dividend, before the charter has expired.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The attorney general alleged that the state, in pursuance of the charter of the bank, delivered it her bonds for $2,400,000, in payment of her subscription of $2,000,000 to the stock; or, at the rate of $100 in her bonds for $83 33 1-3 of stock; and in compliance with a provision of the charter the bank sold, on their own account,

Eastern Dis'ct
January, 1827

THE STATE
vs.
THE BANK OF LOUISIANA.

these bonds for a profit of $321,822 38, before they went into operation. The subscription of the state of $2,000,000 being, at that time paid in full, while the other stockholders, altogether, had paid but $138,840 on theirs. So that the state was entitled to $300,731 66, as her share of these profits.

The authority of the attorney-general to prosecute or defend any suit in which the state is concerned, results from his office, and is expressly given by statute.

That by the charter a sinking fund was constituted for the state, to be administered by her treasurer and the president and cashier of the bank, for the redemption of her bonds; and the said treasurer, president and cashier, were directed by a resolution of the legislature to demand that the portion of the state in the profits so made by the sale of her bonds, should be placed under their direction, to be by them applied to the purposes for which the sinking fund was established; and they were instructed on the refusal of the bank to inform the attorney general, whose duty it was made to take legal measures for enforcing the demand.

Altho' the charter constitutes the board of directors judges of what dividend they should order, yet, if in the exercise of that or any other power confided to them, they abuse it, courts of justice will control them.

The profits made by the Louisiana Bank, on the sale of the state bonds, are to be divided like any other profits, made by it in ordinary transactions.

The object for establishing a bank with corporate powers, is not merely the division of profits among its members.

The petition concludes with an averment of the demand and refusal, and a prayer for judgment against the bank; and that the mo-

Eastern Dis't
January, 1827

THE STATE
vs
THE BANK OF LOUISIANA.

The directors of the Bank of Louisiana, in selling the bonds of the state, had a right to pledge the faith of the institution that the profits arising from the sale should not be divided until payment was made by the state of her bonds to that amount, and the contract is binding on the state.

ney be placed under the direction of the administrators of the sinking fund.

The answer admits the subscription of the state, and the delivery of the bonds, as alleged.

It avers the bonds were made payable to to the president, directors and company of the bank, their successors or assigns; and the mode of assignment prescribed by the charter, was the endorsement of the president and cashier. The bank was authorised to contract for the semi annual interest accruing on the bonds, at such place as the president and directors might deem expedient; but it was provided, that any charge or expense, consequent on the payment of such interest any where but at New Orleans, should be defrayed out of the funds of the bank.

It next avers, that the bank entered into a contract, in the city of New York, with Thomas Wilson & Co. of London, for the sale of the bonds, and accordingly assigned them; and by their endorsement the bank bound themselves for the discharge of the principal, and for the payment of the interest, at the exchange of four shillings and sixpence sterling, per dollar, at the counting house of the pur-

Eastern Dis'ct
January, 1827

THE STATE
vs.
THE BANK OF
LOUISIANA.

chasers, in London, and at the risk and expense of the bank; paying to the said Thomas Wilson & Co. a commission of one half of one per cent. for receiving and paying such interest.

It is further alleged, that previous to this contract, at a board of directors of the bank, twelve of them being present, it was

"*Resolved*. as the opinion of the board, that no sum of money which may be obtained by the sale of the bonds of the state, belonging to this corporation, above the price of 83 1-3 per cent. and not exceeding one hundred, can justly be divided as profits, except in proportion as the dividends on the stock held by the state in the bank shall have left a surplus, after paying the semi annual interests, to be applied to the payment of the bonds, and the amount of $400,000 shall have been rendered.

"*Resolved*, That the president of the bank be authorised to communicate the foregoing resolution to such persons as may make proposals for the purchase of the bonds, and to pledge the faith of this corporation not to make any dividend contrary thereto."

The answer sets forth, that these resolu-

tions were made known to the purchasers, at whose special request, they were inserted at length in the agreement for the sale of the bonds, and that, at the time of the passage of these resolutions, and that of the sale, the whole number of shares of the capital of the bank, subscribed by other stockholders than the state, was 6942, leaving to be subscribed 13,058 shares; and the adoption of these resolutions was indispensably necessary in order to ensure the sale of the bonds of the state and the subscription of the remaining part of the stock, which was afterwards wholly taken up on the faith of these resolutions, and which, with that previously subscribed for, is bound for the discharge of the bonds of the state, and the payment of the interest, according to the contract.

The answer concludes with an averment, that although a profit may hereafter appear to have been made, yet it is impossible for the directors to say that any has, or if any, to what amount, inasmuch as this will depend on the rate of exchange in London, during a long series of years, and the profits made by the bank on its ordinary operations—that the board has ever made such semi annual divi-

Eastern Dis'ct
January, 1827

THE STATE
vs.
THE BANK OF
LOUISIANA.

dends of the profits of the bank, as to them appeared advisable.

The state had judgment, and the bank appealed.

The documents accompanying the record, are:

1. The sale of the bonds of the state by the bank, to Thomas Wilson & Co. It purports to have been made with reference to the resolutions of the board, stated in the answer.

2. A resolution of the legislature, by which the *directors* of the bank appointed by the state, are required to remonstrate against any further reservation being made of the surplus profits of the bank, greater than prudence may render necessary, and the necessities of the state; and the president and cashier of the bank, appointed by the charter administrators of the sinking fund, are directed to demand from the board that the share of the profits made by the sale of the bonds, to which the state would have been entitled if such profits had been divided among the stockholders, at the time the bank commenced its regular operations, in proportion to their respective amount of stock paid for, be placed under their administration to be applied to

the purposes for which the sinking fund was established; and if the demand be not complied with, within thirty days, they are directed to make a report to the attorney general, who is required to take such legal measures to enforce the demand, as he may deem proper.

3. A resolution of the board, setting forth (on the demand) that the surplus funds of the bank are no greater than is necessary for the protection and safety of the bank; nor (after deducting the amount reserved, at the last semi annual dividend, to cover the loss that may probably accrue to the bank from the late failures) than ought to be retained by a provident administration, acting in accordance with strict banking principles, and concluding with the expression of the unanimous opinion of the board; that the directors having already divided such a portion of the profits of the bank as to them seemed advisable, it was considered inexpedient to comply with the demand.

4. A letter from the cashier to the attorney general, in answer to one of the latter, informing him that when the bank went into operation, the amount of cash received was

Eastern Dis'ct
January, 1827

THE STATE
vs
THE BANK OF
LOUISIANA.

$35,640, and of notes endorsed, $103,200. The capital paid before the first dividend was $2,000,000 by the state, and $395,660 by other stockholders, before the bank went into operation; and between that period and the dividend $132,900, were paid by individual stockholders.

5. The report of the commissioners of the sinking fund, to the attorney general.

6. A general statement of the affairs of the bank, on the 23d of January, 1826.

7. A statement of the monies remitted to Thomas Wilson & Co. for the interest due on the bonds, from November 1, 1824, to July 1, 1825, amounting to $80,000; from the last date to January 1, 1826, $60,000, and like sums to July 1, and to Jan. 1, 1827; in all, $260,000, premium $19,047 66, the commission on four instalments, $1,300; postage, $6 77. These charges amounting to $20,404 53, and the whole to $286,404 53.

8. A statement of the dividends declared; shewing that in July, 1825, a dividend of 2 1-2 per cent. was declared, amounting to $62,185 09, of which the state received $50,000, and other stockholders $12,185 00; and that in January, 1826, a dividend of 3 per cent. was

declared, amounting to $78,529 63 cents, of which $60,000 were received by the state, and $18,529 63 cents, by other stockholders.

No testimony was introduced on the part of the state; that introduced by the bank, shews:

Lamfear deposed, that the articles of agreement for the sale of the bonds were discussed and closed in his presence, and payment was made according to them. The indorsement of the bonds was in the following form, viz.:— 'The president, directors and company of the Bank of Louisiana, for value received, do hereby assign the within bond to ————, and bind the capital stock of the said bank, for the payment of the principal sum of said bond, according to the tenor thereof; and do engage to pay the half-yearly interest thereon, at London, at the rate of four shillings and sixpence sterling per dollar, upon the presentation and delivery of the dividend warrant, in the margin thereof; the interest to commence from this day. Witness, the signature of the president and cashier, and the seal of the bank, this first day of November, in the year of our Lord one thousand eight hundred and twenty four. Benjamin Story, president; Joseph Saul, cashier."

Eastern Dis'ct
January, 1827

THE STATE
vs
THE BANK OF
LOUISIANA.

The two resolutions of the bank inserted in the answer, were recited in the contract; and were essential, and indeed, indispensible to the sale of the bonds at the price given for them, (98½ per cent.) and the deponent considered they could not have been sold, except at a much lower rate, if these resolutions had not been passed. He founds his opinion, in this regard, on the circumstance or belief, that the real and essential security of the purchasers of the bonds, is the bank—and to render that security good, it was necessary that the whole price paid for the bonds should remain in bank; there being at the time of the sale but a small part of the stock subscribed for—and, it being understood, the state had but little disposable property, besides the power of taxation. He does not believe the balance of the stock would have been subscribed, had it been understood that the surplus of the proceeds of the bonds, beyond the sum for which the bank received them, was to be divided among the first stockholders.

Parker deposed: he is a merchant, and has resided for several years in New Orleans. On an average for a number of years past,

the exchange on London, on bills drawn in New Orleans, has been at a premium. In his opinion, the retention of the profits on the sale of the bonds of the state, enhanced the stock of the bank; but he cannot say to what degree.

Zacharie deposed that, on the opening of the books, he subscribed for a great number of shares on account of several individuals, who had given him orders for 500 shares. He took twenty shares for each of his employers; but this number was reduced to nineteen. He considered the original subscribers as exclusively entitled to the profits on the bonds of the state.

Saul deposed: he is cashier to the bank. The surplus retained on the first dividend in July, 1825, was $131,364 85, including discounts on bonds discounted, at 12 months; consequently only one half of the amount could be divided, as the dividends are semi-annual. He thinks that, in a bank with a capital like that of the bank of Louisiana, it is proper to retain a surplus of from $250 to $300,000, besides discounts on twelve months' bonds. On the dividend in July, 1825, he thought that 2 per cent. only should have been,

Eastern District
January 1827

THE STATE
vs
THE BANK OF
LOUISIANA.

instead of 2½ per cent. that were, declared. He has resided a number of years in New Orleans, and has scarcely ever known the exchange on London, at par. Generally the premium varies from 5 to 10 per cent.

On his cross-examination, this witness said the surplus retained in January, 1826, was $512,000, including $320,000, made on the bonds of the state. $300,000 were retained for a permanent surplus fund; $80,000 from discount of bonds for making up the dividend in July; and $130,000, in consequence of protested bills and offset.

The points made by the counsel of the bank are, that—

1. This suit was instituted without authority, inasmuch as the resolution of the legislature, relied on by the attorney general, is void; being contrary to the 10th section of the first article of the constitution of the United States.

2. The charter of the bank constitutes the board of directors, the sole judge of the amount of profits to be divided: and this is a part of the contract between the state and the other stockholders, and ought not to be violated.

3. The district judge fell into a great error,

in assuming that $321,822, were made by the bank on the sale of the bonds of the state: whereas, in truth, it cannot be ascertained whether there will be a profit or a loss, until their final payment; and inasmuch as this will depend on the rate of exchange during a period of upwards of 25 years.

4. The resolutions of the board, incorporated into the agreement with the purchasers, were essential to the sale of the bonds, and the bank going into operation; and if any profit result from the sale, it is in consequence of these resolutions. The bank had power to make such a contract with the purchasers, and it cannot be violated.

5. This prosecution, on the part of the state, is highly impolitic.

Before trial, but before the expiration of the ten days allowed for the assignment of errors apparent on the face of the record, (*Code of Practice*, 897.) the counsel for the bank added a new point.

6. The bank is not sueable by the state as a stockholder, except for a settlement of accounts, and the balance appearing due thereon.

The following points were filed by the attorney-general.

Eastern Dis'ct
January, 1826

THE STATE
vs.
THE BANK OF
LOUISIANA.

7. The object of every subscriber to the capital of a bank, is the instant division of the profits as they are made.

8. The profits made on the sale of the bonds, belong exclusively to the stockholders at the time of the sale, and those who subscribed afterwards cannot legally participate in them.

9. They are not to be divided according to the clause of the charter, directing semi-annual dividends: this clause relating only to the ordinary profits of the bank, viz. :—those made by loans or discounts, and the purchase and sale of bills of exchange. The profits in controversy, presenting a *casus omissus* in the charter.

10. The board acted improperly and illegally, in retaining a part of the profits.

VI. As the last point made by the counsel of the bank impugns the right of the state to maintain the present suit, it is first to be disposed of.

The attorney-general moved to have it stricken out, because it was filed too late.

On this part of the case, our opinion is with the counsel of the bank. He has not resorted to this assignment of errors to sustain his appeal: he had a statement of facts to rely on

in the documents and testimony that came up with the record. He is, therefore, at liberty at any time, even without a formal assignment, to draw our attention to any apparent error. It is only when "the appellant does not rely wholly or in part, on a statement of facts, an exception to the judge's opinion, or a special verdict to sustain his appeal: but on an error of law, appearing on the face of the record," that he is "allowed to allege such error, if within *ten days* after the record is brought up, he files, &c." But when the record enables us to act on the merits of the case, our attention may be drawn at any time by either of the parties, to any error of the inferior judge, without having been formally assigned. Indeed, the court would of itself, in many cases, notice the error, even if it escaped the attention of the counsel. Suppose the suit be for the recovery of the wages of iniquity, or to enforce the performance of an illegal or immoral contract, could we affirm a judgment in favour of the plaintiff, because the defendant's counsel mistook, or disregarded his duty?

The attorney-general cannot complain that the assignment of error was filed too late; because his adversary was under no obligation

Eastern Dis'ct
January, 1827

THE STATE
vs
THE BANK OF
LOUISIANA.

of filing it at all, and may have the benefit of it without any, but an oral assignment at the hearing.

The bank relies for support in this part of the case, on the principle laid down by this court, in *Faurie & al.* vs. *Millaudon & al.* Vol. 3. 476.

The plaintiffs there, being some of the stockholders of the Planters' bank, called on the defendants, other stockholders who had, or had had, the management of itsc oncerns, for an account of certain transactions, and for damages alleged to have resulted to the plaintiffs, jointly with the other stockholders, through the misconduct and fraud of the defendants. We held the action did not lie, because no partner is sueable by a co-partner, on a particular transaction of the partnership; but only for a general account, and the balance appearing due thereon.

On this point, however, the opinion of the court is with the attorney-general; because the charter has provided that the stockholders shall receive semi-annual dividends of the profits of the bank. The right being semi-annual, the remedy may be resorted to semi-annually—and with regard to any part of the right

that is violated: otherwise it would not be commensurate with the injury. This case differs materially from that invoked by the bank, which was a suit brought by a number of stockholders against the bank. *C. P.* 829, 830 *and* 835. 7 *T. R.* 543. 2 *Maule & Selwyn*, 53. 2 *Kid on Corp.* 109, 113, 122, 270, 302, 306, *& passim.* This opinion is also in conformity with the opinion of this tribunal, in the case of Brand *vs.* the Louisiana State Bank. 8 *Martin*, 310; and that of the Supreme Court of the state of Massachusetts.

1.—The want of authority in the attorney-general, to institute this suit, was not pleaded before the first judge. It is an allegation which should be made *in limine litis.*

In the case of *Hayes* vs. *Curry*, in which the authority of the attorney, who instituted the suit, was questioned, we held that an attorney duly licensed, is a sworn officer; bound by his oath, as well as by the principles of honour and integrity, which ought to characterise the profession of which he is a member, to demean himself correctly in his practice. It is not to be presumed that he acts without proper authority: on the contrary, every presumption is in favour of his having pursued a proper line of conduct. 9 *Martin*, 88.

EasternDis'ct
January, 1827

THE STATE
vs.
THE BANK OF
LOUISIANA.

The authority of the attorney-general to prosecute or defend any suit, in which the state is concerned, does not, however, result from mere presumption. It is necessarily implied from the nature of his office, and is expressly given by the act of assembly, defining his duties. 1 *Martin's Digest*, 535.

II.—It is true, as contended by the counsel of the bank, that the charter constitutes the board of directors as the sole judge of the amount of profits, which it is, from time to time, advisable to divide; and, that this is a part of the contract between the state and the stockholders, which ought not to be violated. But it is equally so, as urged by the attorney-general, that in this respect they ought to act discreetly; and that if in the exercise of the power given them by this part of the charter, or any other, they act capriciously or illegally, the party injured may seek redress in the courts of justice.

Corporations may enact by-laws for the regulation of the means by which the object of their institution may be obtained. But these bye-laws must be reasonable and consistent with the general principles of the law of the land; and this reasonableness and consistency

is to be tested in a court of justice, when properly brought before it. 2 *Kid on Corp.* 107, 109, 113 and 122. 2 *Maule & Selwyn*, 153. 7 *T. R.* 553. The student may farther attend to what was said by this tribunal, with regard to the right of the party to whom a new trial is refused, to question, on an appeal, the propriety of the exercise of the discretion vested by law in the first judge; in the case of Sorel *vs.* St. Julien. 4 *Mart.* 168. and with regard to a continuance, in that of Broussart *vs.* Mahar's heirs. *ib.* 489.

III. IV.—The error, which it is complained the first judge fell into, in examining the quantum of the profits made by the sale of the bonds of the state; and the power of the board in passing two resolutions, inserted in the answer, and in pledging the faith of the corporation for the payment of the principal of these bonds, will be examined, with the merits of the case in the tenth point.

V.—Whether it be impolitic to bring the present suit, is a question which we trust was duly weighed by the law officer of the state, before he instituted it. We are to determine whether the right exists, and have nothing to do with the policy or impolicy of exercising it.

VI. VII.—The sixth point has already been disposed of; and the seventh presents nothing but an abstract of the profits, which will be examined with the merits of the case in the tenth.

VI I.—It will be time, and the province of those who are to make the division, to inquire whether the profits made by the sale of the bonds of the state, belong exclusively to the stockholders at the time of that sale, when the proper authority in the first or last resort shall have determined that they are divisible.

IX.—We cannot assent to the proposition contended for by the attorney-general, that such profits are to be divided at any other time, or in any other manner, than profits made by the bank in its ordinary transactions, on loans, discounts, and the purchase or sale of bills of exchange, or in any other way whatsoever.

The words of the charter are sufficiently ample to cover the profits in controversy. *All* the profits are spoken of without any exception, and *ubi lex non distinguit, nec nos distinguere debemus.* Why should we make a gratuitous exception, to place at our disposal that of which the legislature has pointed out the application?

There is no ambiguity in the words used, *the profits of the bank;* they must necessarily apply to *all* profits of the bank. When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of following its spirit." *C. code 4, art. 13. Knight* vs. *Smith, 3 Martin, 165.*

Indeed, were we of opinion, that these profits really arose from a *casus omissus*, in the charter, what other disposition could we decree of them, than that pointed out by the legislature in similar or even analogous cases?—*ubi eadem est ratio, eadem est lex.*— Would we not say these profits ought to be divided by the same persons, at the same time, in the same proportion, and among the same individuals as other profits?— Should the board find it convenient to sell any property of the bank, and do so with a profit, can there be any reason for a distinct partition of what is thus gained?

X. The last point brings us to the merits of the case.

The attorney general says that the object of the contract of partnership is the division of the profits. *Contractus societatis est quo-duo, pluresve, inter se pecuniam, res aut*

Eastern Dis'ct January, 1827

THE STATE vs. THE BANK OF LOUISIANA.

opera conferrunt eo fine, ut quod inde redit lucri, inter singulos, pro rata dividatur, Watson's Partnership, 1 & 2.

This doctrine is perfectly correct with regard to *private* partnerships. But corporations are constituted for *public* purposes.—They do not answer the object of their institution, when those to whom the administration of their affairs is confided, losing entirely sight of that object, confine their views to making and dividing profits among the corporators.

The legislature contemplated, in the incorporation of the Bank of Louisiana, the creation of a capital of four millions of dollars, which, by enabling the institution to emit and keep afloat notes to a corresponding amount, should afford it the means of relieving the agricultural and mercantile interest of the state from the pressure of almost universal distress.

This relief was the chief and *main object* for which the corporation was erected. The profits, the corporation were to divide from the investment of their funds, were the *inducements* held out; and their efforts to obtain these profits, consequently insure the

relief, were the *means* by which the *object* was to be obtained.

The first board of directors, in assuming the trust confided to them, found it imposed a threefold duty:—Towards the state, and their fellow-citizens at large, they were bound to exert their utmost faculties in promoting the object intended for their relief—by securing the early and full subscription of the capital of the bank. Towards the corporation, they were bound to protect this capital, by maintaining it in its integrity, and rendering it profitable. Towards the corporation, they were bound to make such semi-annual divisions of the profits, as to them, in the language of the charter, appeared *advisable*.

At a time, when the people labored under the burden of heavy debts, contracted during a period of apparent, but delusive prosperity, a capital of two millions of dollars was to be subscribed for, and bonds of the state to the same amount, were to be brought into market for sale. Subscribers were deterred by the obligation imposed on the bank, to keep branches in the country, the experience of the State Bank shewing

Eastern Dis't
January, 1827

THE STATE
vs.
THE BANK OF
LOUISIANA.

them how burdensome these establishments are—to loan a considerable part of its capital at these branches, on landed security, and to be repaid at deferred annual instalments, and chiefly by the difficulty that it was thought would attend the sale of the bonds of the state, which the charter forbade to be disposed of, at the rate below which the bank had received them.

Louisiana is comparatively as wealthy as any state in the union. But whatever may be the wealth of a state, or potentate, capitalists generally prefer a solvent individual or corporation, to a crowned debtor or independent state; because the latter are incoercible and rarely feel a keen interest in creating or maintaining a reputation for probity and punctuality—the basis of all credit.

Great Britain and France are, perhaps, the wealthiest states in Europe; yet a number of our fellow-citizens have been taught by sad experience, that but little dependence may be placed in the punctuality with which the faith of Great Britain may be expected to be redeemed. It stands pledged since 1815, for the value of their slaves carried away in her fleets; yet their payment seems

more distant after the lapse of twelve years, than it was supposed to be at the ratification of the treaty of Ghent. They find that the faith of the Bank of England and many a private banker in London. on the score of punctuality, would have been a surer pledge than that of the nation. When the allied sovereigns had succeeded in replacing the Bourbons on the throne of France, they declined to take the monarch, with all the resources of his kingdom, as their debtor, for the expenses they had incurred, unless the faith of a private banking house in London was superadded to the royal engagement.

Had the bonds been sent into market, without the pledge of the faith of the bank, purchasers would have reflected that the certainty of the bonds being paid, at their maturity might be doubted; and that if they were not paid then, the obtaining payment of them would be an object, attended certainly with trouble and delay, probably with expense, and possibly pursued without success. The taxes intended to raise the funds might remain uncollected and perhaps unlaid.

Many individuals have noticed from

Eastern Dis'ct
January, 1827

THE STATE
vs.
THE BANK OF
LOUISIANA.

the form of these bnods, inserted in the charter, that it was not expected by the state, that the bank should pledge itself for the payment of the principal.

These bonds are payable to the president, directors and company of the Bank of Louisiana, their successors *or assigns*, not *to their order*; and the bank are authorised to *sell* them for their amount, that is, to transfer for a valuable consideration, their right to the state.

He, who sells a debt, warrants its existence at the time of the sale, but not the solvency of the debtor. *C. code*, 368, *art.* 125 *and* 126. The obligation to guarantee the payment of the principal of these bonds was neither of the essence nor of the nature of the contract by which they were sold, though it might be and was the result of an adventitious clause inserted in the contract.

The dubious success of the institution appearing to depend on the sale, to enforce and effect it, if possible, with a profit, was the object of the constant attention of the board. No better means presented themselves to them, to compass this *desideratum* than to

superadd the pledge of the faith of the bank to that of the state, and with a view of increasing the security of the purchasers by adding to that of their incidental debtors, they promised to retain, out of the profits made by the state, a sum not exceeding $400,000, until the payment of the bonds of the state to that amount. So that while the corporation underwent a responsibility for $2,100,000, it might be able to present to its new creditors a corresponding pledge in its hands, viz.—$2,000,000 in the bank stock of the state, and as much of the profits of the sale, as would amount to $400,000.

The directors of the bank being charged with the administration of its affairs, may certainly pledge its faith in the execution of their trust. Indeed, in most cases, it is impliedly so, as it was in the present for the existence of the debt sold. If, in order to effect the sale and to enforce a profit, it became advantageous to the bank that its faith should be pledged expressly for the payment of the bonds of the state, it is not easy for us to see on what ground it may be contended that while the directors sold a debt due

Eastern Dis'et
January, 827

THE STATE
vs.
THE BANK OF
LOUISIANA.

to the bank, and received its value, they should not accede to the stipulation of the vendee, that the price paid should be restored to him, if he could not obtain payment from the debtor of the bank.

The charter gives the power, and interest makes it the duty of the board, to retain such parts of the profits of the bank as they think advisable. If, therefore, the board thought it advisable, in order to effect a sale and an advantageous one, that the profits made thereon, or a part of them, should not be divided till a certain contingency happened, they acted legally and discreetly in making the promise: unless it be contended that a board of directors cannot derogate from the powers of a subsequent one, and that every board has semi annually the power of determining what part of the profits of the bank it is advisable to demand; unfettered, nay, unembarrassed by the opinion of any preceding board. This question may be discussed and determined by any future board declaring a dividend. Admitting that it may properly be determined in the affirmative, nothing can prevent a subsequent board from considering the resolution

of the first, as discreet and advantageous to the bank, and as such to be carried into effect, notwithstanding their want of obligation. We are to conclude, as the directors who made the first and second dividend did not divide the profits in controversy, they did not deem it advisable to do so.

Another consideration appears to have justi ed the conduct of the board in a considerable degree. The place of payment of the interest arising on the bonds, was to be fixed by the bank. Payment in London (the market in which the bonds were expected finally to find the readiest sale,) was offered, a circumstance, which, while it presented a great inducement to purchasers, and insured a high price, was attended with a corresponding burden on the bank, and detracted from its profits.

It is in evidence, the bank became bound to pay a commission of one half of one per cent. for receiving and paying the semi annual interest in London; and that funds are not conveyed thither from New Orleans, without a loss—that bills of exchange, which offer the cheapest mode of remittance, are generally bought at a premium of from five

to ten per cent. Taking 7 1-2 per cent. the medium for the average price, and adding the commission paid in London, we have 8 per cent Two per cent. will be absorbed, by a commission on brokerage here on the purchase of the bills, and a proper allowance for the risk incurred by endorsement. This makes the loss 10 per cent.

The interest on $2,400,000 at 5 per cent. is $120,000. and the loss on this at 10 per cent. is $12,000; which, repeated yearly, during ten years, to the maturity of the first bonds, is $120.000.

On the bonds payable in fifteen years, the annual loss is reduced by one fourth, by the payment of the first bonds: $9,000 a year for five years, $45,000.

On the bonds at twenty years, the yearly loss is $6,000, and for five years, $30.000.

On the last bonds, payable in twenty-five years, the annual loss is 3,000: for five years, $15,000.

The aggregate loss is $210,000. It diminishes the profits of the sale; not, indeed, by that nominal sum, which is to be paid by several and defined instalments, whilst the profits are received at once.

The attorney-general urges that, by the clause in the charter, authorising the bank to fix the place of payment of the interest accruing on the bonds, it was provided, that the charges and risks attending such payment, elsewhere than in New Orleans, should be borne by the bank. Hence, he concludes that the bank has no right to withhold from the state, any part of its share in the profits made by the sale, to meet the remote chances of loss on exchange, commission in London, or failures. He views the exemption of the state from any defalcation on this account, as a *bonus* stipulated for in the charter.

Had an actual *bonus* been stipulated for in money, the payment of it must have reduced *pro tanto*, the profits of the bank; and, consequently, the share of the state in the profits.

In declaring a dividend, the preservation of the capital of the bank in its integrity is never to be lost sight of, and the profits left after the payment of the *bonus*, if any be stipulated for, are alone divisible. In other words, when the state is a stockholder, it must as such, bear a part of the *bonus*, payable in money, or resulting from an exemption of charges.

Eastern Dis'ct
January, 1837

THE STATE
vs.
THE BANK OF
LOUISIANA.

After a close examination of the evidence, and much attention to the arguments of counsel, the impression left on our minds is that the bonds of the state were estimated at a fair value in the charter; and that if they have been sold above this value, it is owing to the pledge of the faith of the bank, and the assurance given that the profits made on the sale to the amount of $400,000, should not be divided until one-sixth part of the bonds should be discharged, and leave the $2,000,000, the stock of the state in the bank, equal to the amount of the bonds remaining unpaid.

We conclude, that the passing of the resolutions of the board, recited in the agreement for the sale of the bonds, was the discreet exercise of legitimate authority, and that the engagement taken in pursuance of these resolutions, by the agent of the bank in the sale of bonds, ought not to be violated.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and proceeding to render such a judgment as, in our opinion, ought to have been given in the district court; it is ordered that the defendants be dismissed.

The Attorney-general (*Preston*,) for the state, *Livermore* for the bank.

Eastern dis'et
January, 1827

LAPORTE vs. *LANDRY*.

APPEAL from the court of the second district.

The post-office is not a place of deposit for notices of protest, but the mail may be used as a means of their conveyance.

The offer of an endorser to endorse a note for the same sum, is not a waiver of notice.

MARTIN, J. delivered the opinion of the court. The defendant, sued as indorser of a promissory note, pleaded the general issue; there was judgment against him, and he appealed.

The note, indorsement and protest were proved.

The parish judge, acting as notary public, gave notice of the protest to the defendant by a letter directed to him, and put into the post-office at Donaldsonville, parish of Ascension, on the day of the protest. He demanded payment from him, offering to accept his own note; this the defendant declined, but offered to indorse a note of the maker for the same amount.

The defendant resides four miles from Donaldsonville, and in the same parish; there is no mail or post office between Donaldsonville and the defendant's residence. He sends to the post office at Donaldsonville for his letters and

Eastern Dis'ct
January 827

LAPORTE
vs.
LANDRY.

papers, ordinarily; at times, his friends take them out for him.

We are of opinion that the plaintiff has failed to shew a legal notice. Where notice may be conveyed by mail, it suffices to put it in time, properly direc'e'l, in the post office. But where the notice cannot be conveyed by mail, it is idle to put it into the office; for the post office affords a safe means of conveyance, but not a legal place of deposit for notices. This case is not to be distinguished from that of *Clay* vs. *Oakly*, determined last fall at Alexandria.

The offer of the defendant to indorse a note of the maker for the same sum, is no evidence of a waiver of notice. This was pressed on us in this very case last winter. *Vol.* 4, 125; and we said the waiver could not be inferred from this circumstance.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed. And it is further ordered, adjudged and decreed, that there be judgment of non-suit, with costs in both courts.

Morphy for the plaintiff, *Conrad* for the defendant.

BARBARIN vs. SAUCIER.

Eastern Dis't
January, 1827

A conveyance alleged to be fraudulent, cannot be tried by seizing the property as belonging to the vendor and setting up the fraud as a defence. An action must be bro't to annul the conveyance.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The plaintiff states that the defendant who is sheriff of the parish of Plaquemine, has seized a slave belonging to him, to satisfy an execution issued against another person.

The defendant answers that the slave is really the property of the defendant in execution; and that the plaintiff in this suit has, by a collusive and simulated sale, endeavoured to defraud the plaintiff in execution.

The case was submitted to a jury, who found for the defendant, and the court below rendered judgment in conformity therewith; from which the plaintiff appealed.

We are of opinion that the question of fraud could not be tried between these parties in the shape in which it was presented in the court below. Admitting the sheriff had power to contest it, which we doubt, but on which we express no opinion, the sale whether fraudulent or not, vested the legal title to the slave in the plaintiff, and until set aside by the action which the law gives to creditors for that purpose, the sheriff had no right to seize it as the property of the vendor. The case can-

Eastern Dis'ct January, 1827

BARBARIN vs. SAUCIER.

not, in any respect, be distinguished from those of *St. Avid & al.* vs. *Weinprender's Syndics.* 9 *Mart.* 648. *and Haw* vs. *Herriman.* 1 *N. S.* 535.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed. And that the plaintiff do recover possession of the slave sued for, with costs in both courts; reserving, however, to the plaintiff in execution, the right of establishing the fraud in an action to set aside the sale.

Smith for the plaintiff, *Hennen* for the defendant.

STERLING vs. *JOHNSON AND WIFE.*

When by a decree of a court, a party is directed to file a release by public act, previous to taking out execution, it is not a compliance with the decree, to file one *sous seing privé.*

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. This case commenced by an application for an injunction; and the principal question presented for our decision grows out of a decree formerly rendered by the court in an action, wherein the defendants in this suit recovered judgment against the plaintiff.

Eastern Dis'ct
January, 1827

STERLING
vs
JOHNSON.

The acknowledgment of the husband before a notary, of an act under private signature by his wife, does not make it a public act.

When a note is payable to the wife, the husband cannot transfer her right, nor bring nor defend a suit respecting it, without her.

That action was commenced on an obligation, made jointly to the defendants; that is, to the husband and wife. Different debts had been assigned by the plaintiff as a collateral security for the payment; and this court, after giving judgment for the amount due, directed, "that the plaintiff do, previous to taking out execution, execute by *public act*, and file with the clerk of the district court in which the cause was tried, a transfer and assignment of the bonds of M'Gehee and Blackbourne, and M'Gehee and Nelson, or for all the remaining parts or portions of said bonds which may be due, after deducting the sums received by the plaintiffs, and credited to the defendants." *Vol. 3d*, 489.

Previous to issuing the execution, the plaintiffs filed in the office of the clerk of the district court, two instruments of writing, which, in obedience to the decree of this court, did renounce their right to the obligations therein mentioned; but that of the wife was an act *sous seing prive*, and that of the husband was as follows: "Be it remembered, that on this fifth day of May, in the year of our Lord 1825, personally appeared, R. Post Johnson, for himself and Martha J. Johnson, his wife,

Eastern Dis'ct January 1827

STERLING vs. JOHNSON.

of the city of New Orleans; who acknowledged the foregoing instrument of assignment, and transfer, to be their act and deed; and be it also remembered, that the said R. Post Johnson did, for himself and wife, relinquish, transfer, assign and deliver unto John Sterling, surviving partner of A. & J Sterling, all the monies that may be due on the bonds, &c. &c.

The cause was submitted to a jury in the court of the first instance, who found a verdict for the defendants, upon which verdict the court gave judgment dissolving the injunction. The plaintiff appealed.

The first point which it appears to us the case presents, is, whether the act of the wife under *private signature*, was a compliance with the decree of the court, that the assignment should be by *public act*.

We are of opinion that it was not. It does not conform with the letter of the decree; nor does it comply with the spirit and intention of it. The object of the court in directing the assignment to be by public act, was to insure the defendent against the trouble and difficulty of proving the instrument if it should be thereafter questioned. Were we even to admit that

an act under private signature, was a compliance in substance, with the order of the court, the record offers no proof that the act of transfer was really executed by the wife.

The next is, whether the acknowledgment of the husband on the part of the wife, is binding on her, so as to make the *sous seing privé* a public act; and if it be not, whether the assignment made by him in the same instrument, in the name of his wife, supplies the defect.

The original suit was brought on a note, payable to both husband and wife; and the action was commenced in the names of both. In the absence of any evidence to the contrary, we are bound to consider that the part of the note which belonged to the wife had not entered into the community. As her property, therefore, he could neither alienate it, nor bring, nor defend a suit respecting it, without her. There has been an exception to this general rule, lately introduced into our code, in relation to the partition of an estate belonging to the wife which consists in moveables; provided the same has been brought in by her as dowry. But the jurists who drew up the amendments state in their report to the legisla-

Eastern Dis'ct
January, 1827

STERLING
vs.
JOHNSON.

ture, that it was not intended to confer this authority in case the estate was paraphernal. Admitting that we could, by parity of reasoning, extend the principle so as to sanction acts of the husband, other than partition, in relation to the property of his wife, the record furnishes no evidence which brings the defendants within the exception.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the defendants be enjoined from taking out execution on the judgment rendered in this court in the case of Johnson and wife *vs.* Sterling, until they comply with the condition therein expressed—and that they pay costs in both courts.

Woodroof for the plaintiff, *Hennen* for the defendants.